

person accused of such offence if that person is under 16 years of age or a woman or a sick or infirm.

I form the view that the provision relating to criminal procedure must be construed strictly. To my mind section 41B(1) and (2) should not override the proviso to section 388(i) of the Criminal Procedure Code. I appreciate that it is a double-edged weapon and it may equally be used by the Public Prosecutor to advance the argument that it is the intention of the legislature to impose absolute statutory prohibition against the release of a person charged with offences covered by section 41B(1).

For myself I am inclined to think that section 41B(1) and (2) should not be construed as having the effect of fettering the court's absolute discretion to grant bail under the provision of the Criminal Procedure Code in cases covered by the proviso under section 388(i) of the Criminal Procedure Code. It is, of course, subject to the rule of law that the discretion must in each case be exercised judicially. For purposes of the present case, however, this is not strictly in issue.

It was for this reason that I dismissed the appeal. I do, however, appreciate that the point of law is of public interest and should, therefore, be fully considered and determined by the Federal Court.

Appeal dismissed.

Solicitors: *Kumar & Co.*

**IMPERIAL GARMENTS SDN. BHD. v.
LUCULENT SHIPPING COMPANY OF PANAMA
& ORS.**

[O.C.J. (Arulanandom J.) December 10, 1979; June 23;
October 6, 1980 & January 6, 1981]

[Penang — Civil Suit No. 674 of 1977]

Shipping Law — Claim against Port Commission as third defendants — Reliance by Port Commission on statutory protection — Penang Port Commission (Amendment) Act, 1976, s. 75A(1) & (2)(a).

The plaintiffs as owners of 20 cartons of textile piece goods valued at \$16,905.60 filed an action against the first and second defendants as owners and charterers of the vessel "Luculent" for non-delivery or in the alternative delivery in a damaged condition of the said goods shipped on board the said vessel.

The Penang Port Commission third defendants, were also included as a defendant as according to the pleadings in the alternative the first and second defendants did deliver the said goods to the third defendants who in breach of their duty failed to deliver the twenty cartons or in the alternative delivered the twenty cartons in a damaged condition to the plaintiffs.

The third defendants raised the preliminary objection that they were protected by statute and could not be held liable. They relied on section 75A(1) and (2)(a) of the Penang Port Commission (Amendment) Act 1976.

Held, dismissing the claim against the third defendants: (1) where the language of the law is clear and unambiguous the court cannot but give it the straightforward and ordinary meaning;

(2) the language and intention of the legislature give the Port Commission protection against claims arising out of their action as agents of shipowners and charterers of ships. The

A court cannot deny them the protection whatever the other consequences may be, far-reaching or otherwise.

CIVIL SUIT.

Lim Peng Siew for the third defendants/applicants.

Cecil Abraham for the plaintiffs/respondents.

B **Arulanandom J.:** In this case the plaintiffs as owners of twenty cartons of textile piece goods valued at \$16,905.60 filed an action against the first and second defendants as owners and charterers of the vessel "Luculent" for non-delivery or in the alternative delivery in a damaged condition of the said goods shipped on board the said vessel. The third defendants were also included as a defendant as according to the pleadings in the alternative the first and second defendants did deliver the said goods to the third defendants who in breach of their duty failed to deliver the twenty cartons or in the alternative delivered the twenty cartons in a damaged condition to the plaintiffs.

D The third defendants raised the preliminary objection that they were protected by statute and could not be held liable. They thereupon applied by way of motion to have the claim against them dismissed with costs.

They relied on section 75A(1) and (2)(a) of Akta A338, Akta Surohanjaya Pelabohan Pulau Pinang (Pindaan) 1976, which came into force on February 26, 1976. Section 75A(1) and (2)(a) read as follows:—

E "75A. (1) The Commission and any person duly authorized by it shall, in respect of any goods other than transshipment goods deposited with or placed in the custody or control of the Commission for the purpose of shipment or delivery, be deemed to be the agent of the owner of the vessel loading or discharging such goods irrespective of whosoever pays or is liable to pay any rates in respect of such goods.

F (2) Neither the Commission nor any person duly authorized by it shall, in acting as an agent under the provisions of subsection (1), be liable—

(a) either in damages or in any other respect for any loss caused to any person by reason of short delivery of any goods deposited with or placed in the custody or control of the Commission or any failure by the Commission to deliver or account for them."

G The third defendants averred that in view of the above law they could not be held liable in damages for any loss whatsoever unless the goods were for transshipment (which was not the case here).

The plaintiffs' first answer to the third defendants' plea was that if there was such a defence in law it ought to have been pleaded which was not done in the present case. The third defendants promptly remedied this defect by applying to court for leave to amend the defence which the court granted. In the amended defence the third defendants included a paragraph 8(a) which reads as follows:—

H "8(a). The third defendants will aver that the goods claimed upon are not transshipment goods and accordingly the third defendants are protected from liability under section 75A(1) and 2(a) of the Penang Port Commission (Amendment) Act, 1976, Act A338, which came into force on February 27, 1976."

Hence the plaintiffs could not prevent the third defendants relying on their plea purely from a procedural stand.

The plaintiffs then sought to establish that the protection of the law given to the third defendants

was limited only to any loss or damage caused by negligence and not to loss or damages resulting from any fundamental breach of their duties like theft of goods by or with the connivance of the third defendants' employees, wilful damage and storage in grossly inadequate conditions.

It is not necessary for this court to make a ruling on this proposition because from the pleadings itself it is obvious that what the plaintiffs are alleging against the third defendants is liability for loss and damage caused by their negligence.

Paragraph 14 of the statement of claim reads as follows:—

"14. Further or in the alternative the loss and damage sustained were due to the negligence of the 3rd defendants their servants and/or agents.

PARTICULARS OF NEGLIGENCE

- (a) Delivering the goods in a damaged condition,
- (b) Failing to deliver the said goods,
- (c) Failing to have a proper system of supervision,
- (d) Failing to take proper steps to ascertain the goods were intact."

There is no allegation of breach of statutory duty or wilful loss or damage.

The plaintiffs have argued that section 75A(2) is not capable of construction so as to exclude all liability imposed by statute upon the Penang Port Commission for the reason that such a construction would entail the very far-reaching and disastrous consequence of nullifying the statutory obligations imposed upon the Port Authority by virtue of section 104 and section 105 of the Contracts Act 1950 and section 65(4) of the Customs Act.

Be that as it may, where the language of the law is clear and unambiguous the court cannot but give it the straightforward and ordinary meaning. Here the language and intention of the legislature give the Port Commission protection against claims arising out of their action as agents of shipowners and charterers of ships. The court cannot deny them the protection whatever the other consequences may be, far-reaching or otherwise.

Under the circumstances the claim against the third defendants is dismissed with costs.

Order accordingly.

Solicitors: *Lim Huck Aik; Shearn, Delamore & Co.*

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JUMARI BIN MOHAMED v. PUBLIC PROSECUTOR

[O.Cr.J. (Mohamed Azmi J.) March 14, 1981]

[Kuala Lumpur — Federal Territory Criminal Application No. 15 of 1980]

B *Criminal Law & Procedure — Petition of Appeal — Application for extension of time — Court's discretion — Criminal Procedure Code, ss. 307 & 310.*

The applicant was found guilty and convicted of two charges of corruption under the Prevention of Corruption Act 1961. He was sentenced to eighteen months' imprisonment on each charge, the sentence to run concurrently. On May 12, 1980 he filed Notice of Appeal against the said conviction and sentence. On October 30, 1980 the appeal records were served on his solicitor. Under section 307(iv), the Petition of Appeal ought to have been filed by October 13, 1980; otherwise the appeal shall be deemed to have been withdrawn under section 307(ix). This was not done for the reasons given: (1) October 4 & 5 were Saturday and Sunday respectively; (2) October 6, counsel was engaged at the sitting of the Penang Legislative Assembly; (3) October 9, counsel was ill; (4) October 13 — the last date for filing — counsel felt that he needed more time to study the notes of evidence before filing the Petition of Appeal; (5) counsel was not the same counsel for the applicant at the trial so he was not able to study the Appeal record closely on October 13.

D **Held**, dismissing the application: (1) the discretion conferred on a judge by section 310, Criminal Procedure Code applies to all applications for extension time pertaining to criminal appeals to the High Court and they include an application to file Notice of Appeal out of time;

E (2) the reasons put forward were too flimsy and frivolous for the court to exercise discretion under section 310, Criminal Procedure Code;

F (3) there was nothing on record to show that the Applicant's conviction was wrongful; no substantial justice would be done if the extension of time were allowed in this case. For the purpose of doing substantial justice, the court must bear in mind that justice must be done not only to the convicted person but also to society at large on whose behalf the Public Prosecutor acts;

(4) an extension of time to file Petition of Appeal or to amend such petition out of time should not be granted as a matter of course.

Cases referred to:—

- G** (1) *Veerasingam v. Public Prosecutor* [1958] M.L.J. 76.
- (2) *A. Dickinson v. Public Prosecutor* [1955] M.L.J. 191.
- (3) *Wong Swee Chin v. Public Prosecutor* [1977] 2 M.L.J. 194, F.C.
- (4) *R. v. Nagalingam* [1935] M.L.J. xxix.
- (5) *R. v. Moona Mohamad Hussain Maricar* [1936] M.L.J. 36.

H CRIMINAL APPLICATION.

Karpal Singh (C. Kandiah with him) for the applicant.

Suriyadi bin Halim Omar (Nik Abdul Rahman bin Nik Mat with him) (Deputy Public Prosecutor) for the respondent.

I **Mohamed Azmi J.:** This is an application by Notice of Motion under section 310 of the Criminal Procedure Code for extension of time to file Petition of Appeal out of time.

The application, which is opposed by the Public Prosecutor, first came up for argument on November 17, 1980. It was then adjourned to a date to be fixed by Senior Assistant Registrar, to enable the applicant's